

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

## WELLS FARGO BANK, N.A.,

2:08-CV-1448 JCM (RJJ)

**Plaintiff,**

V.

LaSALLE BANK NATIONAL  
ASSOCIATION,

**Defendant.**

## ORDER

15 Presently before the court is plaintiff Wells Fargo Bank, N.A.'s consolidated motion *in  
16 limine*. (Doc. #180). Defendant LaSalle Bank National Association filed an opposition. (Doc.  
17 #188). Plaintiff then filed a response. (Doc. #191).

18       Although a trial has not yet been scheduled for this case, the parties have each filed motions  
19 *in limine* pursuant to a stipulated agreement. (Doc. #172). According to the stipulation, the parties  
20 will bring the majority of their objections to exhibits and deposition designations through motions  
21 *in limine*. (Doc. #172).

22 Plaintiff brings this consolidated motion *in limine* to limit “any statement, testimony,  
23 reference of any sort, including exhibit(s), by counsel, any party or witness that relates, refers, or  
24 pertains” to nine categories of potential issues or evidence. (Doc. #180). The court will address each  
25 of these categories in turn.

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## Legal Standard

Pursuant to Federal Rule of Evidence 402, only relevant evidence is admissible at trial. Evidence is relevant if “it has any tendency to make a fact more probable or less probable than it would be without the evidence.” FED. R. EVID. 401; *M2 Software, Inc. v. Madacy Entm’t*, 421 F.3d 1073, 1088 (9th Cir. 2005). Courts in the Ninth Circuit routinely grant motions *in limine* seeking to exclude evidence that is irrelevant to the claims and defenses at issue. See, e.g., *M2 Software*, 421 F.3d at 1087-88.

8       Federal Rule of Evidence 403 provides that evidence, although relevant, may be excluded  
9   “if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the  
10 issues, misleading the jury, undue delay, waste of time, or needlessly presenting cumulative  
11 evidence.” FED. R. EVID. 403. This is a balancing test left to the sound discretion of the trial court.  
12 *See, e.g., Maddox v. City of L.A.*, 792 F.2d 1408, 1417-18 (9th Cir. 1986).

13 I. Events occurring after the MF2 closing date to the extent they pertain to whether a  
14 breach of a representation and warranty had a material and adverse effect

In its first motion *in limine*, plaintiff seeks to limit the introduction of any evidence, testimony, or reference to the post-closing decline and condition of the economy and real estate and mortgage markets as they pertain to plaintiff's claims for material and adverse effect. Plaintiff argues that its claims of material and adverse effect are not based on the post-closing performance or default of the loans. Specifically, plaintiff asserts that its claims of material and adverse effect are based upon evidence that existed as of the closing date. Therefore, according to plaintiff, evidence of the subsequent economic decline is immaterial to the case at bar.

22 This court is inclined to agree with the Oklahoma court’s ruling on a similar motion *in*  
23 *limine*: “Evidence regarding the post-securitization market meltdown is relevant only if [p]laintiff  
24 asserts material and adverse effects occurred after the securitization closing date. So long as  
25 [p]laintiff asserts material and adverse effects as of the closing date, evidence regarding the post-  
26 securitization market conditions is inadmissible.” (Ex. 1, Okla. memorandum opinion and order,  
27 p. 17).

1       If plaintiff limits its material and adverse effects claim to evidence available as of the closing  
 2 date, evidence or testimony of general post-closing economic conditions is irrelevant.

3       **II. Due diligence and relative sophistication of MF2 certificate holders as it impacts**  
 4       **LaSalle's contractual obligations and/or liability**

5       In its next motion *in limine*, plaintiff seeks to prohibit defendant from arguing at trial that  
 6 MF2 certificate holder Forum's due diligence and sophistication have any impact on defendant's  
 7 contractual obligations or liability. Plaintiff asserts that the "clear, unambiguous" language of the  
 8 mortgage loan purchase agreement does not relieve defendant of any liability or obligation with  
 9 respect to any representation or warranty contained in the mortgage loan purchase agreement. Thus,  
 10 according to plaintiff, defendant should not be permitted to argue that Forum's due diligence or  
 11 sophistication impacted defendant's contractual obligations.

12       At this point in the litigation, the court is not inclined to find, as a matter of law, that the  
 13 language in the mortgage loan purchase agreement effectively prohibits defendant from introducing  
 14 evidence about due diligence and sophistication. The court has never ruled on this specific issue,<sup>1</sup>  
 15 and it declines to do so in this consolidated motion *in limine*.

16       **III. Risk of investing and rate of return in MF2**

17       Plaintiff moves to limit information concerning risk, profit, and rate of return in MF2,  
 18 arguing that this evidence is irrelevant to plaintiff's claims that defendant breached representations  
 19 and warranties. Plaintiff argues that these risks pertain to the performance of the loan, not the risk  
 20 that defendant would breach a representation and warranty, which is the basis of plaintiff's claims.

21       The court is not inclined to find that this evidence is irrelevant to the claims and defendant's  
 22 defense theory. *See FED. R. EVID. 401.* Therefore, the court will allow defendant to introduce  
 23 evidence of the risk of investing and the rate of return in MF2 loans. However, similar to the  
 24 Oklahoma court, the court may issue a limiting instruction to prevent confusion, if necessary, during

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26       <sup>1</sup> Plaintiff's reply brief cites to "the [c]ourt's prior summary judgment ruling" for the  
 27 proposition that the mortgage loan purchase agreement renders certificate holder due diligence  
 28 irrelevant. (Doc. #191). It is unclear to which ruling plaintiff is referring – the only summary  
 judgment order issued by this court does not address this issue.

1 the course of the trial. (Ex. 1, Okla. memorandum opinion and order, p. 18); *see also* FED. R. EVID.  
 2 403.

3 **IV. LaSalle's lack of knowledge prior to closing dates as a defense to breach of  
 4 representations and warranties 13, 23, or 35**

5 Plaintiff moves to prohibit defendant from making any argument, suggestion, defense, or  
 6 introducing related evidence that defendant's alleged breaches, actions, or omissions related to  
 7 representations and warranties 13, 23, and 35 are excused due to any lack of knowledge of the breach  
 8 by defendant. Specifically, plaintiff argues that, according to the negotiated language of these  
 9 specific representations and warranties, there is no knowledge requirement in order to find a breach.  
 10 Thus, evidence of lack of knowledge would simply confuse the jury as to the ultimate issues.  
 11 Defendant has not contested plaintiff's assertion that representations and warranties 13, 23, and 35  
 12 require actual knowledge.

13 These representations and warranties do not require defendant to have had knowledge of the  
 14 breach at the time of the breach. Again, this court is inclined to agree with the Oklahoma court.  
 15 "Because [d]efendant's lack of knowledge regarding warranty breaches is no defense to  
 16 [d]efendant's potential liability and the probative value, if any, of this evidence is exceeded by its  
 17 potential to confuse the jury, this evidence is inadmissible." (Ex. 1, Okla. memorandum opinion and  
 18 order, p. 19).

19 **V. Whether errors in appraisals had a significant effect under Uniform Standards of  
 20 Professional Appraisal Practice Standards rule 1-1(b)**

21 In its fifth motion *in limine*, plaintiff seeks to limit any argument that appraisal errors did not  
 22 have a "significant effect" on the appraisals. Plaintiff asserts that this evidence is irrelevant and  
 23 based on a faulty reading of the relevant Uniform Standards of Professional Appraisal Practice rules.

24 The parties argued this issue in the prior summary judgment motions. In its order denying  
 25 summary judgment, the court stated that there were genuine issues of material fact remaining for trial  
 26 and did not grant any individual part of the parties' motions for summary judgment. In other words,  
 27 the court declined to rule on this issue, among others. Accordingly, the court is not inclined to hold,  
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1 as a matter of law, that evidence of a “significant effect” is irrelevant here based on this consolidated  
 2 motion *in limine*. Thus, similar to the court’s ruling in the plaintiff’s second motion *in limine*  
 3 (*supra*), the court declines to grant this motion *in limine* at this stage in the litigation.

4 **VI. Additional or different expert opinions from those expressed in LaSalle’s experts  
 5 reports or depositions**

6 The parties agree that neither party’s experts should be permitted to testify to opinions not  
 7 disclosed in their reports, consistent with Federal Rule of Civil Procedure 26(a)(2) and well-settled  
 8 case law. The parties apparently disagree on the appropriate scope of expert testimony. In its  
 9 opposition, defendant states that plaintiff should not be able to supplement insufficient expert reports  
 10 with subsequent depositions. Plaintiff asserts that defendant has waived this argument because  
 11 defendant did not make an affirmative motion in its separate motions *in limine* filing.

12 The court grants plaintiff’s motion *in limine* to the extent that expert opinions not disclosed  
 13 in expert reports are not admissible. Further, expert testimony is admissible if it is *within the scope*  
 14 of the opinions expressed in the expert report.

15 **VII. Whether plaintiff mitigated damages**

16 Plaintiff’s seventh motion *in limine* seeks to prohibit any argument that plaintiff failed to  
 17 mitigate its damages. Plaintiff notes that the court bifurcated these proceedings into liability and  
 18 remedy phases. Mitigation of damages is a remedy-related issue that should properly be asserted in  
 19 the remedy phase. Defendant argues that mitigation issues are relevant in the liability stage,  
 20 specifically as they relate to the material adverse effect analysis and determining customary industry  
 21 standards.

22 The court agrees with plaintiff that at the liability stage, evidence and testimony of any failure  
 23 to mitigate damages would tend to confuse the fact finder. *See FED. R. EVID. 403.* Plaintiff has  
 24 consistently stated that its material adverse effect claim is based on evidence that existed as of the  
 25 closing date. Therefore, under plaintiff’s claim, post-closing failure to mitigate would not impact  
 26 defendant’s liability (although it might impact the appropriate remedy). Accordingly, the court  
 27 grants plaintiff’s seventh motion *in limine*.

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1     **VIII. Crown NorthCorp's special servicer rating or financial issues**

2         Plaintiff also moves the court to limit any evidence pertaining to Crown NorthCorp's  
 3 downgraded special servicer rating. This downgrading is irrelevant to the instant litigation because  
 4 it was issued "well after the 2006 MF2 [c]losing [d]ate" and would only serve to confuse the fact  
 5 finder. (Doc. #180).

6         Once again, the court agrees with the Oklahoma court that evidence of the downgraded  
 7 special servicer rating and any information related to Crown NorthCorp's financial issues are  
 8 inadmissible. (Ex. 1, Okla. memorandum opinion and order, p. 21).

9     **IX. Whether representation and warranty breaches were material**

10       Finally, plaintiff moves the court to prohibit defendant from arguing that plaintiff must prove  
 11 both "material and adverse effect" *and* that the breach itself was "material." Plaintiff argues that this  
 12 added materiality requirement is unnecessarily duplicative and is not supported by the applicable  
 13 contract language and New York law.

14       Defendant first responds that plaintiff is precluded from re-litigating this issue due to the  
 15 Ohio court's ruling. Defendant also argues that its proposed double materiality requirement is well-  
 16 supported through legal precedent.

17       First, this court is not bound by the Ohio court's ruling. That decision was not a final  
 18 decision. *Ariz. v. Cal.*, 530 U.S. 392, 414 (2000). Second, the court does not endorse defendant's  
 19 contention that the double materiality requirement is well-supported by the relevant case law. The  
 20 instant contract dispute requires plaintiff to demonstrate that a representations and warranties breach  
 21 has a material and adverse effect. Any additional requirement to show that the breach itself was  
 22 material would be unnecessarily duplicative. The court, therefore, agrees with the Oklahoma court  
 23 when it stated that it was "unpersuaded that in addition to the clearly-stated requirement that  
 24 [p]laintiff prove [material and adverse effect], [p]laintiff must also prove material breach. . . .  
 25 [P]laintiff is only required to prove material effects, not material breach. . . ." (Ex. 14, Okla.  
 26 memorandum opinion and order, p. 45). Therefore, the court grants plaintiff's final motion *in limine*.

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1 || Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff's consolidated motion *in limine* (doc. #180) be, and the same hereby is, GRANTED in part and DENIED in part.

4 || DATED December 15, 2011.

**UNITED STATES DISTRICT JUDGE**